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SUPREME COURT OF OHIO

No. 2006-1025

NORFOLK SOUTHERN RAILWAY COMPANY,
Appellant,

v.

HOMER R. BOGLE, ET AL.,
Appellees.

Appeal from the Court of Appeals
for Cuyahoga County (No. 86339)

Submitted May 1, 2007
Decided October 10, 2007

O'DONNELL, J.

{¶ 1} The central issue presented for our consideration concerns whether the application of the prima facie filing requirements of 2003 Am.Sub.H.B. 292 ("H.B. 292"), as codified in R.C. 2307.92, to asbestos claims arising out of the Federal Employers' Liability Act ("FELA") or the Locomotive Boiler Inspection Act ("LBIA") infringes upon the Supremacy Clause of the United States Constitution and therefore is preempted by federal law. For the reasons that follow, we have concluded that the appellate court erred in finding preemption, and therefore, we reverse the judgment of the court of appeals.

{¶ 2} Based on its belief that "[t]he current asbestos personal injury litigation system is unfair and inefficient, imposing a severe burden on litigants and taxpayers alike," the General Assembly enacted H.B. 292. H.B. 292, Section 3(A)(2), 150 Ohio Laws, Part III, 3970, 3988. By the end of 2000, "over six hundred thousand people [had] filed asbestos claims" nationwide, and Ohio had "become a haven for asbestos claims and, as a result, is one of the top five state court venues for asbestos filings." Id. at Section 3(A)(3)(a) and (b), 150 Ohio Laws, Part III, 3989. The General Assembly further noted that in Cuyahoga County alone, the asbestos docket increased from approximately 12,800 cases in 1999 to over 39,000 cases by October 2003. Id. at Section 3(A)(3)(e), 150 Ohio Laws, Part III, 3989. Eighty-nine percent of claimants do not allege that they suffer from cancer, and "[s]ixty-six to ninety per cent of these non-cancer claimants are not sick." Id. at Section 3(A)(5), 150 Ohio Laws, Part III, 3990.

{¶ 3} Upon these considerations, the General Assembly enacted R.C. 2307.91 through 2307.98 to serve four primary purposes: (1) to give priority to those claimants who can demonstrate actual physical harm caused by asbestos, (2) to preserve the rights of those who were exposed for future action, (3) to enhance the state's system of supervision and control over asbestos-related litigation, and (4) to conserve the scarce resources of the defendants so as to allow compensation for cancer victims while also securing a right to similar compensation for those who suffer harm in the future. Id. at Section 3(B), 150 Ohio Laws, Part III, 3991.

{¶ 4} At issue here are R.C. 2307.92 and 2307.93. R.C. 2307.92(B) provides, "No person shall bring or maintain a tort action alleging an asbestos claim based on a nonmalignant condition in the absence of a prima-facie showing" of physical injury caused by asbestos exposure. The prima facie showing requires the claimant to submit a report containing medical findings and to include a demonstration "that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition." Id. The statute also contains prima facie filing requirements for asbestos claimants who bring a wrongful-death action, and for claimants who are smokers suffering from lung cancer. R.C. 2307.92(C) and (D).

{¶ 5} In cases filed after the effective date of the legislation, a claimant has 30 days after initiating the action to comply with these prima facie requirements. R.C. 2307.93(A)(1). In cases pending at the time of the bill's passing – such as those in the instant matter – claimants have 120 days from the effective date to comply. R.C. 2307.93(A)(2). Failure to file the report results in administrative dismissal, a procedure by which the case is essentially rendered inactive, but the court retains jurisdiction over the matter. R.C. 2307.93(C). A claimant may move to reinstate the case to the active docket if the claimant "makes a prima-facie showing that meets the minimum requirements specified in division (B), (C), or (D) section 2307.92 of the Revised Code." Id.

The Supremacy Clause and Preemption

{¶ 6} The Supremacy Clause of the United States Constitution provides that "the Laws of the United

States * * * shall be the supreme Law of the Land; * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Clause 2, Article VI, United States Constitution. The clause grants Congress the power to preempt state laws. See *Jenkins v. James B. Day & Co.* (1994), 69 Ohio St.3d 541, 544, 634 N.E.2d 998, citing *In re Miamisburg Train Derailment Litigation* (1994), 68 Ohio St.3d 255, 259, 626 N.E.2d 85.

{¶ 7} The United States Supreme Court has identified three methods by which Congress may preempt state legislation. First, it may expressly state that an enactment preempts applicable state law. *Shaw v. Delta Air Lines, Inc.* (1983), 463 U.S. 85, 95-98, 103 S.Ct. 2890, 77 L.Ed.2d 490. Second, Congress may preempt an entire field of activity, without expressly stating its intention to do so, if an intent to preempt can be inferred "from a 'scheme of federal regulation * * * so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" (Ellipsis and brackets sic.) *English v. Gen. Elec. Co.* (1990), 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65, quoting *Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447. Finally, Congress preempts state law when a state law actually conflicts with a federal law, i.e., "where it is impossible for a private party to comply with both state and federal requirements." *English*, 496 U.S. at 78-79, 110 S.Ct. 2270, 110 L.Ed.2d 65.

{¶ 8} This case involves field preemption, as Congress "intended to occupy the field" when it passed

the FELA, Section 51, Title 45, U.S.Code and LBIA, Section 20701, Title 49, U.S.Code. *Napier v. Atlantic Coast Line RR. Co.* (1926), 272 U.S. 605, 613, 47 S.Ct. 207, 71 L.Ed. 432. Despite the preemption of substantive state regulation, however, the court has instructed that "FELA cases adjudicated in state courts are subject to state procedural rules." *St. Louis Southwestern Ry. Co. v. Dickerson* (1985), 470 U.S. 409, 411, 105 S.Ct. 1347, 84 L.Ed.2d 303. State procedural rules therefore govern FELA claims in state court.

{¶ 9} In this instance, the FELA creates a claim based upon, inter alia, a violation of the LBIA. The LBIA "does not purport to confer any right of action upon injured employees. It merely makes violation of its prohibitions 'unlawful.' Yet it has been held consistently that the Boiler Inspection Act supplements the Federal Employers' Liability Act by imposing on interstate railroads 'an absolute and continuing duty' to provide safe equipment." *Urie v. Thompson* (1949), 337 U.S. 163, 188, 69 S.Ct. 1018, 93 L.Ed. 1282, quoting *Lilly v. Grand Trunk W. RR. Co.* (1943), 317 U.S. 481, 485, 63 S.Ct. 347, 87 L.Ed. 411.

Procedural History

{¶ 10} This case began when four claimants, Homer Bogle, Charles Weldon, William Monroe, the administrator of the estate of Worth Oliver Bryant, deceased, and Eric Wiles, individually and in his capacity as executor of the estate of Larry Wiles, filed separate suits against Norfolk Southern Railway Company alleging asbestos-related injuries under the LBIA and seeking relief pursuant to the FELA. After the claimants filed suit, the General Assembly enacted H.B. 292, which required claimants with cases pending at the time of enactment to comply with its

provisions requiring a medical report as described in the statute. The claimants, however, failed to comply with these requirements within the prescribed 120-day time period.

{¶ 11} In response to their failure, Norfolk filed this action seeking a declaration that R.C. 2307.92 applies to these claimants and that its requirements do not violate the Supremacy Clause of the United States Constitution. The trial court concluded that the requirements violated the Supremacy Clause because substantive rights created by federal statute – in this case the FELA and LBIA – "cannot be lessened or destroyed by a rule of practice." *Norfolk S. RR. Co. v. Ferebee* (1915), 238 U.S. 269, 273, 35 S.Ct. 781, 59 L.Ed. 1303. In the trial court's view, "application of H.B. 292 to the instant cases is preempted by the FELA and LBIA. Furthermore, all pending and future FELA/LBIA cases filed by plaintiffs pursuant to R.C. § 2307.93, et seq., are preempted by that extensive body of federal jurisprudence."

{¶ 12} Norfolk appealed that determination to the Cuyahoga County Court of Appeals. The appellate court affirmed the trial court's judgment, reasoning that the requirements of R.C. 2307.92 "would 'gnaw' at the FELA/LBIA claimants' substantive rights to assert a cause of action under federal law in a state court" and that the claimants "would essentially be indefinitely precluded from asserting their federal rights." *Norfolk S. Ry. v. Bogle*, 166 Ohio App.3d 449, 2006-Ohio-1540, 850 N.E.2d 1281, ¶ 26. The appellate court held that the application of the statute to asbestos claims arising under the FELA and/or the LBIA infringes on the Supremacy Clause of the United States Constitution and thus is preempted by federal law. Id. at ¶ 30.

{¶ 13} The case is now before this court upon our acceptance of Norfolk's discretionary appeal.

{¶ 14} Norfolk has asserted one proposition of law: "The medical criteria and the administrative dismissal process set forth in R.C. 2307.92 and R.C. 2307.93 are procedural and not substantive and are thus applicable to asbestos-related FELA/LBIA claims filed in state court without offending the Supremacy Clause of the United States Constitution or the doctrine of federal preemption."

{¶ 15} Norfolk urges that these statutes establish procedural rules that do not affect substantive federal rights and that the prima facie filing requirements mirror those established in the federal courts themselves. Thus, in Norfolk's view, these procedural statutory requirements do not infringe on the field of locomotive safety that Congress has preempted. The claimants have not filed a merit brief in this case and, therefore, did not argue before this court.

The Burden on FELA Claimants

{¶ 16} We initially consider whether the prima facie filing requirements are substantive or procedural in nature, as the FELA/LBIA preempts all substantive state law in the field. In *Jones v. Erie RR. Co.* (1922), 106 Ohio St. 408, 412, 140 N.E. 366, we stated that substantive laws or rules are those that "relate[] to rights and duties which give rise to a cause of action." By contrast, procedural rules concern "the machinery for carrying on the suit." Id. A review of the statutes reveals that they do not grant a right or impose a duty that "give[s] rise to a cause of action." Id. Instead, the impact of these statutes is to establish a procedural prioritization of the asbestos-related cases on the court's docket.

Nothing more. Simply put, these statutes create a procedure to prioritize the administration and resolution of a cause of action that already exists. No new substantive burdens are placed on claimants, because Civ.R. 11 requires a party to certify, by signing a complaint, that there are "good ground[s] to support it."

{¶ 17} In this context, we observe generally that the FELA applies to all railroad common carriers and their employees. To recover for an injury, an employee must prove that the injury occurred in the course of employment, that the railroad was engaged in interstate commerce at the time of the injury, and that the injury resulted in whole or in part from the railroad's negligence. See *Norfolk & W. Ry. v. Ayers* (2003), 538 U.S. 135, 160, 123 S.Ct. 1210, 155 L.Ed. 2d 261. That burden remains unchanged following enactment of R.C. 2307.92 and 2307.93. Thus, the provisions of the statutes do not relate to the rights and duties that give rise to this cause of action or otherwise make it more difficult for a claimant to succeed on the merits of a claim. Rather, they pertain to the machinery for carrying on a suit. They are therefore procedural in nature, not substantive.

{¶ 18} This conclusion, however, does not end our analysis, because procedural rules apply to federal claims only so long as they do not operate to impair a claimant's ability to enforce a federal right or cause of action. *Davis v. Wechsler* (1923), 263 U.S. 22, 24, 44 S.Ct. 13, 68 L.Ed. 143. Accordingly, "[s]trict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws." *Brown v. W. Ry. of Alabama* (1949), 338 U.S. 294, 298, 70 S.Ct. 105, 94 L.Ed. 100. The prime consideration, therefore, is whether the proce-

dural provisions impose an unnecessary burden on FELA claimants.

{¶ 19} Several decisions of the United States Supreme Court support the position that the application of the prima facie filing requirements does not impose an unnecessary burden on a federal right and therefore does not violate the Supremacy Clause. In *Minneapolis & St. Louis RR. Co. v. Bombolis* (1916), 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed. 961, the court upheld a Minnesota provision relaxing the requirement of a unanimous verdict in an FELA case. Bombolis had filed a wrongful-death suit in a Minnesota state court alleging a violation of the FELA. Id. at 215, 36 S.Ct. 595, 60 L.Ed. 961. A Minnesota law provided that when a civil case had been submitted to a jury for at least 12 hours with no unanimous verdict, "five sixths of the jury are authorized to reach a verdict, which is entitled to the legal effect of a unanimous verdict at common law." Id. at 216, 36 S.Ct. 595, 60 L.Ed. 961. The railroad objected to this procedure, urging that the federal nature of the FELA claim required application of the Seventh Amendment, which the court noted "exacts a trial by jury according to the course of the common law, that is, by a unanimous verdict." Id., citing *Am. Publishing Co. v. Fisher* (1897), 166 U.S. 464, 17 S.Ct. 618, 41 L.Ed. 1079.

{¶ 20} Despite the federal claim at issue, the court rejected the application of the Seventh Amendment to a state court proceeding, reasoning that Congress "clearly contemplate[d] the existence of a concurrent power and duty of both Federal and state courts to administer the rights conferred by the statute in accordance with the modes of procedure prevailing in such courts." *Bombolis*, 241 U.S. at 218, 36 S.Ct.

595, 60 L.Ed. 961. Although the decision focused on the Seventh Amendment, the court also considered the broader effects of the "dual constitutional system of government," of which the Supremacy Clause is a crucial component. Id. at 221, 36 S.Ct. 595, 60 L.Ed. 961. Requiring a state court to use a federal procedural standard would, in the court's view, undermine the independent nature of the sovereign: "whether [courts] should be considered as state or as Federal courts would from day to day depend not upon the character and source of the authority with which they were endowed by the government creating them, but upon the mere subject-matter of the controversy which they were considering." Id.

{¶ 21} The United States Supreme Court has also held that whether the doctrine of forum non conveniens applies to FELA cases in state court is a matter for the forum state. *Missouri ex rel. S. Ry. Co. v. Mayfield* (1950), 340 U.S. 1, 4, 71 S.Ct. 1, 95 L.Ed. 3. In *Mayfield*, the court determined that states could employ the doctrine of forum non conveniens so long as the application did not work to discriminate against federal claims, reasoning that nothing in the FELA "purported 'to force a duty' upon the State courts to entertain or retain Federal Employers' Liability litigation 'against an otherwise valid excuse.'" Id. at 5, 71 S.Ct. 1, 95 L.Ed. 3, quoting *Douglas v. New York, New Haven & Hartford RR. Co.* (1929), 279 U.S. 377, 388, 49 S.Ct. 355, 73 L.Ed. 747.

{¶ 22} In more recent decisions, the United States Supreme Court has upheld other state court procedural rules that differ from those in place in the federal courts. In *Johnson v. Fankell* (1997), 520 U.S. 911, 915, 117 S.Ct. 1800, 138 L.Ed.2d 108, the court held that a defendant in an action brought in state

court pursuant to Section 1983, Title 42, U.S.Code had no federal right to an interlocutory appeal from the denial of qualified immunity, even though denial constituted a final order for actions in federal court under Section 1291, Title 28, U.S.Code and *Mitchell v. Forsyth* (1985), 472 U.S. 511, 524-530, 105 S.Ct. 2806, 86 L.Ed.2d 411. The court has reasoned, "'The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them * * *. Some differences in remedy *and procedure* are inescapable if the different governments are to retain a measure of independence in deciding how justice should be administered.'" (Emphasis added and ellipsis sic.) *Southland Corp. v. Keating* (1984), 465 U.S. 1, 33, 104 S.Ct. 852, 79 L.Ed.2d 1, quoting Hart, The Relations Between State & Federal Law (1954), 54 Col.L.Rev. 489, 508. Furthermore, the court has declared that "[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts," it will act "'with utmost caution before deciding that [the state court] is obligated to entertain the claim.'" *Johnson*, 520 U.S. at 918, 117 S.Ct. 1800, 138 L.Ed.2d 108, quoting *Howlett v. Rose* (1990), 496 U.S. 356, 372, 110 S.Ct. 2430, 110 L.Ed.2d 332. "States may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law." *Howlett*, 496 U.S. at 372, 110 S.Ct. 2430, 110 L.Ed.2d 332.

{¶ 23} And in *Am. Dredging Co. v. Miller* (1994), 510 U.S. 443, 114 S.Ct. 981, 127 L.Ed.2d 285, the court extended the reasoning of *Mayfield* to maritime actions brought pursuant to the federal Jones Act. In reaching its holding, the court emphasized that the doctrine of forum non conveniens "does not bear upon

the substantive right to recover, and is not a rule upon which * * * actors rely in making decisions about primary conduct – how to manage their business and what precautions to take." Id. at 454, 114 S.Ct. 981, 127 L.Ed.2d 285.

{¶ 24} In the instant case, R.C. 2307.92 and 2307.93 are "neutral state Rule[s] regarding the administration of the state courts," *Johnson*, 520 U.S. at 918, 117 S.Ct 1800, 138 L.Ed.2d 108, that do "not bear upon the substantive right to recover," *Miller*, 510 U.S. at 454, 114 S.Ct. 981, 127 L.Ed.2d 285. The burden imposed is no greater than the Civ.R. 11 pleading standard established and followed throughout this state. The statute simply permits the court to prioritize claims for trial purposes.

{¶ 25} In holding that the LBIA preempted the application of these statutes, the court of appeals relied on *Brown v. W. Ry. of Alabama* (1949), 338 U.S. 294, 295, 70 S.Ct. 105, 94 L.Ed. 100. In *Brown*, the court invalidated a Georgia rule of practice that required a trial court to construe the allegations in a complaint "'most strongly against the pleader'" when considering a motion to dismiss. Id. at 295, 70 S.Ct. 105, 94 L.Ed. 100, quoting *Brown v. W. Ry. of Alabama* (1948), 77 Ga.App. 780, 49 S.E.2d 833, syllabus. The application of this rule of practice to Brown's FELA claim resulted in a dismissal of the matter with prejudice, precluding future recovery. Id. Citing its desire for uniformity in adjudication of federal claims, the court emphasized its duty "to protect federally created rights from dismissal because of overexacting local requirements for meticulous pleadings." Id. at 299, 70 S.Ct. 105, 94 L.Ed. 100.

{¶ 26} *Brown* is distinguishable in two respects.

{¶ 27} First, the Georgia rule of practice had no similar federal counterpart. The federal rule, later embodied in *Conley v. Gibson* (1957), 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80, had long required a trial court to deny motions to dismiss unless it "'appear[ed] from the allegations that a cause of action does not exist, rather than that a cause of action has been defectively stated.'" *Leimer v. State Mut. Life Assur. Co.* (C.A.8, 1940), 108 F.2d 302, 305, quoting *Winget v. Rockwood* (C.A.8, 1934), 69 F.2d 326, 329. The Georgia standard, therefore, was antithetical to that used in the federal courts. More important, the Georgia standard precluded recovery in a state court despite the fact that Brown's complaint would have easily withstood scrutiny in a federal forum.

{¶ 28} Second, the Georgia rule of practice functioned as a dismissal with prejudice, while in the instant case, failure to comply with the prima facie filing requirements carries no such penalty. A claimant who fails to comply with these requirements faces administrative dismissal *without* prejudice, and the case effectively becomes "inactive" for purposes of discovery and trial. R.C. 2307.93(C). Moreover, the statutes toll the limitations period and permit a claimant to reinstate the matter upon a showing of the requisite injury. Id. For these reasons, R.C. 2307.92 and 2307.93 do not impose the same degree of burden on a party asserting a federal claim in state court as the rule of practice at issue in *Brown* does, and the court of appeals erred in holding the statute unconstitutional on this basis.

{¶ 29} We therefore hold that the prima facie filing requirements of R.C. 2307.92 are procedural in nature, and their application to claims brought in state court pursuant to the FELA and the LBIA does

not violate the Supremacy Clause, because the provisions do not impose an unnecessary burden on a federally created right.

{¶ 30} Our conclusion that the procedural statute at issue does not impose an unnecessary burden on a federal right is fortified by the fact that the federal courts themselves have responded to the growth of asbestos litigation by initiating a similar method to prioritize asbestos-related cases. Beginning in 1991, the Judicial Panel for Multidistrict Litigation transferred 26,639 asbestos-related cases from federal district courts into one forum. *In re Asbestos Prods. Liability Litigation* (1991), 771 F.Supp. 415. To accommodate the ever-growing docket, the District Court for the Eastern District of Pennsylvania established a screening process regarding nonmalignant asbestos-related injuries through the use of a pretrial order. *In re Asbestos Prods. Liability Litigation* (Sept. 16, 1996), E.D.Pa. No. MDL 875, 1996 WL 539589, *1. For example, Administrative Order No. 8 applies to all asbestos claimants that file a complaint "without a doctor-patient medical report setting forth an asbestos related disease." *In re Asbestos Prods. Liability Litigation* (Jan. 16, 2002), E.D.Pa. No. 875, 2002 WL 32151574, *1. Claims without this documentation "shall be subject to administrative dismissal without prejudice and with the tolling of all applicable statutes of limitations." Id. Furthermore, after administrative dismissal of a case, a claimant may move to reinstate the case by submitting "an affidavit setting forth the facts that qualify the case for active processing," with the claimant bearing the burden to show "some evidence of asbestos exposure and evidence of an asbestos-related disease." Id. at *2.

{¶ 31} While the provisions of the statutes at issue are more specific than those enunciated in Administrative Order No. 8, the effect and purpose are generally the same. The Supremacy Clause does not require states to employ procedures identical to those in the federal courts, as long the procedures in question involve neutral rules regarding the administration of the courts. The statutes are procedural in nature, apply to all asbestos claims filed in Ohio regardless of the theory or statutory basis giving rise to relief, and serve to make efficient use of judicial resources.

{¶ 32} We therefore reverse the decision of the court of appeals and remand this cause for further proceedings.

Judgment reversed.

LUNDBERG STRATTON, O'CONNOR, LANZINGER, and CUPP, JJ., concur.

MOYER, C.J., and PFEIFER, J., dissent.

PFEIFER, J., dissenting.

{¶ 33} I disagree with the majority opinion's conclusion that R.C. 2307.92 does "not impose an unnecessary burden on a federally created right." The majority opinion states that "the impact of [R.C 2307.92] is to establish a procedural prioritization of the asbestos-related cases on the court's docket. Nothing more." I believe, to the contrary, that "[t]he new Ohio requirement precludes the [Federal Employers' Liability Act/Locomotive Boiler Inspection Act ('FELA/LBIA')] claimants from proceeding on their claims until filing the report satisfying the requirements of R.C. 2307.92 et seq. * * * [T]his requirement would 'gnaw' at the FELA/LBIA claim-

ants' substantive rights to assert a cause of action under federal law in a state court." *Norfolk S. Ry. Co. v. Bogle*, 166 Ohio App.3d 449, 2006-Ohio-1540, 850 N.E.2d 1281, ¶ 26. I believe that FELA and LBIA preempt R.C. 2307.92. I dissent.

MOYER, C.J., concurs in the foregoing opinion.

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT, CUYAHOGA COUNTY

No. 86339

NORFOLK SOUTHERN RAILWAY COMPANY,
Appellant,

v.

HOMER R. BOGLE, ET AL.,
Appellees.

Decided March 30, 2006

COLLEEN CONWAY COONEY, Presiding Judge.

{¶ 1} Plaintiff-appellant, Norfolk Southern Railway Company ("Norfolk"), appeals the trial court's decision denying its request for declaratory relief and finding that Am.Sub.H.B. No. 292 ("H.B. 292") is preempted by the Federal Employer's Liability Act ("FELA"), Section 51 et seq., Title 45, U.S.Code, and/or the Locomotive Boiler Inspection Act ("LBIA"), as amended, Section 20701 et seq., Title 49, U.S. Code. Finding no merit to the appeal, we affirm.

{¶ 2} Between September 1999 and March 2004, defendants-appellees, Charles Odell Weldon and Eric A. Wiles, individually and in his capacity as executor of the estate of Larry Arnold Wiles, deceased (collectively "appellees"), filed claims against Norfolk alleging injuries caused by occupational exposure to various products, including those containing asbestos, during the course and scope of their employment

with Norfolk.[1] Appellees brought these causes of action under the FELA and LBIA.

{¶ 3} On September 13, 2004, Norfolk filed a complaint for declaratory judgment concerning the above pending cases. Norfolk requested a declaratory judgment to declare that (1) the newly enacted H.B. 292, effective September 2, 2004, applied to those pending cases, and (2) that H.B. 292 did not infringe on the Supremacy Clause of the United States Constitution.

{¶ 4} Following various procedural motions and an oral hearing, the trial court denied the relief sought by Norfolk by declaring that H.B. 292 did not apply to FELA/LBIA cases because it was preempted by federal law.

{¶ 5} Norfolk appeals this decision, raising three assignments of error, which will be addressed together.

Standard of Review

{¶ 6} The issue before us is whether the application of H.B. 292 to asbestos claims arising under the FELA and/or LBIA infringes on the Supremacy Clause of the United States Constitution and thus is preempted by federal law. This issue is a question of law. Accordingly, we apply a de novo standard of review without deference to the trial court's decision on this issue. *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835; *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St.3d 521, 523, 668 N.E.2d 889.

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[1] Defendants-appellees, Homer Bogle and William H. Monroe Jr., as administrator of the estate of Worth Oliver Bryant, were voluntarily dismissed from this appeal.

H.B. 292: Applicability to the FELA and/or LBIA

{¶ 7} In its first and second assignments of error, Norfolk argues that the trial court erred as a matter of law by declaring that H.B. 292 ("the Act") does not apply to asbestos claims arising under the FELA and/or LBIA because the plain language of the Act demonstrates that it was intended to apply to all asbestos cases filed in the state courts of Ohio. It further argues that the Act is procedural in application, rather than substantive, and, thus, it does not infringe on the Supremacy Clause and is not preempted by federal law.

{¶ 8} In construing a statute, a court's paramount concern is the legislative intent in enacting the statute. *State v. S.R.* (1992), 63 Ohio St.3d 590, 594, 589 N.E.2d 1319. To determine the legislative intent, a court must look to the language of the statute. *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 104, 65 O.O.2d 296, 304 N.E.2d 378. Words used in a statute are to be given their usual, normal, and customary meaning. *State ex rel. Pennington v. Gundler* (1996), 75 Ohio St.3d 171, 173, 661 N.E.2d 1049. Further, unless a statute is ambiguous, the court must give effect to the plain meaning of a statute. Id.

{¶ 9} The preemption doctrine arises out of the Supremacy Clause of the United States Constitution, which provides that the laws of the United States shall be "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Article VI, United States Constitution. Therefore, pursuant to the Supremacy Clause, Congress possesses the power to preempt state law. *Minton v. Honda of Am. Mfg., Inc.* (1997),

80 Ohio St.3d 62, 68, 684 N.E.2d 648. Moreover, "'pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.'" Id., quoting *In re Miamisburg Train Derailment Litigation* (1994), 68 Ohio St.3d 255, 260, 626 N.E.2d 85.

{¶ 10} Federal preemption of state law can occur where Congress has occupied the entire field (field preemption) or where there is an actual conflict between federal and state law (conflict preemption). *Carter v. Consol. Rail Corp.* (1998), 126 Ohio App.3d 177, 181, 709 N.E.2d 1235. Field and conflict preemption are both forms of implied preemption. Id., citing *Minton*, 80 Ohio St.3d at 69, 684 N.E.2d 648.

{¶ 11} Absent express statutory language preempting state law, preemption should be strictly construed in favor of finding against preemption. "In the interest of avoiding unintended encroachment on the authority of the States * * *, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find preemption." *CSX Transp., Inc. v. Easterwood* (1993), 507 U.S. 658, 663-664, 113 S.Ct. 1732, 123 L.Ed.2d 387. The critical question in any preemption analysis is whether Congress intended state law to be superseded by federal law. *Minton*, 80 Ohio St.3d at 69, 684 N.E.2d 648.

{¶ 12} However, when the federal government completely occupies a given field or an identifiable portion of it, the test of preemption is whether "'the matter on which the state asserts the right to act is in any way regulated by the Federal Act.'" *Carter*, 126 Ohio App.3d at 182, 709 N.E.2d 1235, quoting *Burlington N. RR. Co. v. Connell* (E.D.Wash.1993),

811 F.Supp. 1459, 1465. See, also, *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm.* (1983), 461 U.S. 190, 212-213, 103 S.Ct. 1713, 75 L.Ed.2d 752.

{¶ 13} In the seminal case of *Napier v. Atlantic Coast Line RR. Co.* (1926), 272 U.S. 605, 613, 47 S. Ct. 207, 71 L.Ed. 432, the United States Supreme Court held that Congress, through the LBIA, intended the federal government to occupy the field of locomotive safety. The LBIA was enacted to protect employees and the traveling public from defective locomotive equipment. *Urie v. Thompson* (1949), 337 U.S. 163, 188, 190-191, 69 S.Ct. 1018, 93 L.Ed. 1282. The LBIA imposes an absolute duty on interstate railroads to provide safe equipment and subjects railroads to FELA suits by their employees for LBIA violations. Id. at 189, 69 S.Ct. 1018, 93 L.Ed. 1282.

{¶ 14} Addressing the breadth of the federal government's authority under the LBIA, the Supreme Court found it extended "to the design, the construction and the material of every part of the locomotive and tender and all appurtenances." *Seaman v. A.P. Green Industries* (2000), 184 Misc.2d 603, 604, 707 N.Y.S.2d 299, quoting *Napier*, 272 U.S. at 611, 47 S. Ct. 207, 71 L.Ed. 432. The field preemption of the LBIA applies not only to state legislative regulation, but also to state tort claims. Id., at 605, 707 N.Y.S.2d 299. The LBIA preempts any state law that regulates locomotive equipment because the LBIA was enacted with the congressional intent to occupy the field of locomotive equipment and safety, particularly as it relates to injuries suffered by railroad workers in the course of their employment. *Law v. Gen. Motors Corp.* (C.A.9, 1997), 114 F.3d 908, 910.

{¶ 15} Ohio and other jurisdictions have held that the LBIA preempts state tort actions brought by railroad employees injured by exposure to asbestos-containing locomotive components against railway companies and manufacturers. *Darby v. A-Best Products Co.*, 102 Ohio St.3d 410, 2004-Ohio-3720, 811 N.E.2d 1117; *Seaman*, supra; *Scheiding v. Gen. Motors Corp.* (2000), 22 Cal.4th 471, 93 Cal.Rptr.2d 342, 993 P.2d 996; *In re West Virginia Asbestos Litigation* (2003), 215 W.Va. 39, 592 S.E.2d 818. Therefore, the FELA and/or the LBIA entirely preempts the field of locomotive safety and bars state tort claims, including those related to asbestos injuries.

{¶ 16} When field preemption has been found, there is no need for legislative intent specifically directed at tort law, product-liability claims, or any other particular type of state regulation. *Carter*, 126 Ohio App.3d at 183, 709 N.E.2d 1235. When state law is preempted, the claims that depend on it are necessarily precluded. Id., citing *Napier*, 272 U.S. at 613, 47 S.Ct. 207, 71 L.Ed. 432. Therefore, it is not required that the General Assembly expressly exclude or include FELA and/or LBIA claims from the Act, because those claims are necessarily precluded.

{¶ 17} Instead of state tort claims, injured railroad workers asserting injury under the LBIA must bring their claims under the FELA. *Seaman*, 184 Misc.2d at 605, 707 N.Y.S.2d 299, citing *Wabash R. Co. v. Hayes* (1914), 234 U.S. 86, 34 S.Ct. 729, 58 L.Ed. 1226. "Whether a locomotive is off-line in a repair shop or moving interstate, the LBIA preempts state tort law, and the FELA replaces it in the railroad workplace environment." *Darby v. A-Best Products Co.*, Cuyahoga App. No. 81270, 2002-Ohio-7070, 2002

WL 31839197, affirmed, 102 Ohio St.3d 410, 2004-Ohio-3720, 811 N.E.2d 1117.

{¶ 18} "One of the purposes of the FELA was to 'create uniformity throughout the Union' with respect to railroads' financial responsibility for injuries to their employees." *Hess v. Norfolk S. Ry. Co.*, 106 Ohio St.3d 389, 2005-Ohio-5408, 835 N.E.2d 679, ¶ 18, quoting *Norfolk & W. Ry. Co. v. Liepelt* (1980), 444 U.S. 490, 493, 100 S.Ct. 755, 62 L.Ed.2d 689. "The Supreme Court has long emphasized that uniform application of the FELA is 'essential to effectuate its purposes' and that 'state laws are not controlling in determining what the incidents of this federal right shall be.'" Id., quoting *Dice v. Akron, Canton & Youngstown RR. Co.* (1952), 342 U.S. 359, 361, 72 S.Ct. 312, 96 L.Ed. 398.

{¶ 19} FELA cases may be brought, at plaintiff's option, in federal court or in state court. Section 56, Title 45, U.S.Code. Therefore, "as a general matter, FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal." *Hess*, supra, at ¶ 18, quoting *St. Louis Southwestern Ry. Co. v. Dickerson* (1985), 470 U.S. 409, 411, 105 S.Ct. 1347, 84 L.Ed.2d 303. Therefore, it is clear that the FELA and/or the LBIA preempts any state law that is deemed substantive. However, the Act may be applicable to the federal claims if the Act is procedural in nature. Fortunately, we need not address the issue of whether the overall application of the Act is procedural or substantive because even if we deemed it procedural, which we reserve for discussion at a later date, a substantive right under federal law cannot be lessened or destroyed by a state rule of practice. *Norfolk S. RR. Co. v. Ferebee* (1915), 238 U.S. 269, 35 S.Ct.

781, 59 L.Ed. 1303. The Supreme Court acknowledged that the extent to which the rules of practice and procedure may "dig" into substantive rights is "troublesome." *Brown v. W. Ry. of Alabama* (1949), 338 U.S. 294, 296, 70 S.Ct. 105, 94 L.Ed. 100. The court further noted the impossibility of laying down a precise rule to distinguish "substance" from "procedure." Id. Therefore, we must look at the application of the Act to determine its effect on asbestos claims filed under FELA and/or the LBIA.

{¶ 20} The Act, as codified at R.C. 2307.91 et seq., took effect on September 2, 2004. It reformed asbestos litigation in Ohio by establishing a uniform process for asbestos claimants to use in advancing their claims. The General Assembly, in enacting the Act, stated the following goals:

> (1) give priority to those asbestos claimants who can demonstrate actual physical harm or illness caused by exposure to asbestos; (2) fully preserve the rights of claimants who were exposed to asbestos to pursue compensation should those claimants become impaired in the future as a result of such exposure; (3) enhance the ability of the state's judicial systems and federal judicial systems to supervise and control litigation and asbestos-related bankruptcy proceedings; and (4) conserve the scarce resources of the defendants to allow compensation of cancer victims and others who are physically impaired by exposure to asbestos while securing the right to similar compensation for those who may suffer physical impairment in the future.

Am.Sub.H.B. 292, Section 3(B).

{¶ 21} To maintain a tort action under R.C. 2307.92, a claimant must file, within 30 days of filing

his action, "a written report and supporting test results constituting prima facie evidence of the exposed person's physical impairment that meets the minimum requirements" of the applicable section of R.C. 2307.92. See R.C. 2307.93(A)(1). However, if the claim was pending prior to the effective date of the Act, then the written report is required to be filed within 120 days following the effective date of the Act. R.C. 2307.93(A)(2).

{¶ 22} In the instant case, appellees' claims were pending prior to the effective date of the Act; thus the "post-complaint" report was required to be filed by January 3, 2005. Failure to file the required report results in an administrative dismissal of the claim without prejudice. R.C. 2307.93(C). However, the case may be reinstated once the plaintiff makes a prima facie showing that meets the minimum requirements specified in the applicable section under R.C. 2307.92.

{¶ 23} The applicable section in the instant case is R.C. 2307.92(B), an asbestos claim based on a nonmalignant condition. R.C. 2307.92(B) provides that before a claimant can maintain a tort action under this section, the prima facie showing/report must include "that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition." That prima facie showing shall include all of the following minimum requirements:

> (1) Evidence verifying that a competent medical authority has taken a detailed occupational and exposure history of the exposed person from the exposed person or, if that person is deceased, from the person who is most knowledgeable about the

exposures that form the basis of the asbestos claim for a nonmalignant condition, including all of the following:

(a) All of the exposed person's principal places of employment and exposures to airborne contaminants;

(b) Whether each principal place of employment involved exposures to airborne contaminants, including, but not limited to, asbestos fibers or other disease causing dusts, that can cause pulmonary impairment and, if that type of exposure is involved, the general nature, duration, and general level of the exposure.

(2) Evidence verifying that a competent medical authority has taken a detailed medical and smoking history of the exposed person, including a thorough review of the exposed person's past and present medical problems and the most probable causes of those medical problems;

(3) A diagnosis by a competent medical authority, based on a medical examination and pulmonary function testing of the exposed person, that all of the following apply to the exposed person:

(a) The exposed person has a permanent respiratory impairment rating of at least class 2 as defined by and evaluated pursuant to the AMA guides to the evaluation of permanent impairment.

(b) Either of the following:

(i) The exposed person has asbestosis or diffuse pleural thickening, based at a minimum on radiological or pathological evidence of asbestosis or radiological evidence of diffuse pleural thickening. The asbestosis or diffuse pleural thickening de-

scribed in this division, rather than solely chronic obstructive pulmonary disease, is a substantial contributing factor to the exposed person's physical impairment, based at a minimum on a determination that the exposed person has any of the following:

(I) A forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal;

(II) A total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal;

(III) A chest x-ray showing small, irregular opacities (s,t) graded by a certified B-reader at least 2/1 on the ILO scale.

(ii) If the exposed person has a chest x-ray showing small, irregular opacities (s,t) graded by a certified B-reader as only a 1/0 on the ILO scale, then in order to establish that the exposed person has asbestosis, rather than solely chronic obstructive pulmonary disease, that is a substantial contributing factor to the exposed person's physical impairment the plaintiff must establish that the exposed person has both of the following:

(I) A forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal;

(II) A total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal.

R.C. 2307.92(B).

{¶ 24} Failure to make such a prima facie showing results in an administrative dismissal until such time that the plaintiff can make such showing. Consequently, a claimant asserting a cause of action under the FELA and/or LBIA in an Ohio state court would be precluded from proceeding on his cause of action until he files this mandated postcomplaint report making the requisite prima facie showing. No other state, except Georgia, has such a requirement.[2]

{¶ 25} It has clearly been decided that a federal right cannot be defeated by the forms of local practice. *Brown*, 338 U.S. at 297, 70 S.Ct. 105, 94 L.Ed. 100. This rule has been held to apply to FELA cases. Id., citing *Reynolds v. Atlantic Coast Line RR. Co.* (1949), 336 U.S. 207, 69 S.Ct. 507, 93 L.Ed. 618. Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws. Id. "'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.'" *Brown*, 338 U.S. at 298-299, 70 S.Ct. 105, 94 L.Ed. 100, quoting *Davis v. Wechsler* (1923), 263 U.S. 22, 24, 44 S.Ct. 13, 68 L.Ed. 143. "Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved."

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[2] In 2005, Georgia passed legislation requiring asbestos claimants to file a similar report before proceeding on the merits of their claims. No appellate decisions have been rendered interpreting those statutes. Georgia's statutes contain language similar to the Ohio Act.

Brown, 338 U.S. at 299, 70 S.Ct. 105, 94 L.Ed. 100, citing *Brady v. S. Ry. Co.* (1943), 320 U.S. 476, 479, 64 S.Ct. 232, 88 L.Ed. 239. "Peculiarities of local law may not gnaw at rights rooted in federal legislation." *S. Buffalo R. Co. v. Ahern* (1953), 344 U.S. 367, 73 S.Ct. 340, 97 L.Ed. 395, citing *Am. Ry. Express Co. v. Levee* (1923), 263 U.S. 19, 21, 44 S.Ct. 11, 68 L.Ed. 140.

{¶ 26} In the instant case, the Act requires that claimants seeking to bring a claim for injury allegedly from asbestos exposure submit a report after their initial claim is filed. The new Ohio requirement precludes the FELA/LBIA claimants from proceeding on their claims until filing the report satisfying the requirements of R.C. 2307.92 et seq. We hold that this requirement would "gnaw" at the FELA/LBIA claimants' substantive rights to assert a cause of action under federal law in a state court. FELA claimants would essentially be indefinitely precluded from asserting their federal rights until they complied with these requirements. This would not further Congress's intent of creating "uniformity throughout the Union with respect to railroads' financial responsibility for injuries to their employees." *Liepelt*, 444 U.S. at 493, 100 S.Ct. 755, 62 L.Ed.2d 689.

{¶ 27} Norfolk argues that federal courts employ a procedure similar to the Act to prioritize and administratively dismiss FELA asbestos claims. Therefore, Norfolk claims that if the FELA actions at issue had been filed in federal court, appellees would have been subject to similar procedural requirements. Norfolk points to the Administrative Order No. 8 of the United States District Court Judge Charles R. Weiner, filed January 16, 2002, which implemented a

prioritization and administrative dismissal process for FELA cases. A cursory reading reveals that the order provides that a doctor-patient medical report setting forth an asbestos-related disease is required. However, we have no evidence before us demonstrating or identifying what requirements the report must include. The order provides:

> 1. [a]ll non-malignant, asbestos related, personal-injury cases assigned to MDL 875 which were initiated through a mass-screening shall be subject to administrative dismissal without prejudice and with the tolling of all applicable statute of limitations.
>
> * * *
>
> 3. Any party may request reinstatement to active status of a case by filing with the Court a request for reinstatement together with an affidavit setting forth the facts that qualify the case for active processing. * * * The burden at any hearing to reinstate shall be upon the plaintiff to show some evidence of asbestos exposure and evidence of an asbestos-related disease. Exposure to specific products shall not be a requirement for reinstatement.

{¶ 28} Clearly, the mandates that this administrative order imposes on a FELA plaintiff are not as detailed and stringent as those required under R.C. 2307.92(B). Therefore, contrary to Norfolk's assertion, appellees would not have been subject to the same administrative dismissal and reinstatement process had they filed their claims in federal court. Accordingly, we conclude that the Act, as applied to FELA/LBIA claimants, is not merely procedural, as it might preclude claimants from vindicating a

substantive right to bring a claim under FELA/LBIA. Moreover, federal law preempts the entire field of locomotive safety, including asbestos-related injury claims.

{¶ 29} Norfolk makes a policy argument as its final assignment of error. Norfolk argues that if we exclude FELA actions from the application of the Act, certain fundamental rights of the FELA defendants will be infringed upon, including the rights of contribution and indemnification. We hold that this argument is not ripe for our review because the FELA defendants have not suffered any infringement of their rights concerning indemnification or contribution. Although we understand the proactive argument raised by Norfolk, we hold that such policy arguments are better suited for the General Assembly. Nevertheless, in *Hess*, the Ohio Supreme Court held that the proper measure of damages under the FELA is governed by federal law rather than state law. Therefore, any indemnification or contribution sought by Norfolk should be pursued under the jurisdiction of federal law. The Act would seemingly have no application or effect.

{¶ 30} Therefore, we hold that the application of H.B. 292 to asbestos claims arising under the FELA and/or the LBIA infringes on the Supremacy Clause of the United States Constitution and thus is preempted by federal law. Accordingly, Norfolk's assignments of error are overruled.

Judgment affirmed.

KILBANE and TIMOTHY E. McMONAGLE, JJ., concur.

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Civil Action – Asbestos

Case No. CV-04-542998

NORFOLK SOUTHERN RAILWAY COMPANY,
Plaintiff,

v.

HOMER R. BOGLE, ET AL.,
Defendants.

[Filed April 15, 2005]

JUDGMENT ENTRY

The Court wishes to clarify its February 24, 2005 Entry and Opinion. Defendant's Motion to Dismiss Norfolk Southern Railway Company's Complaint for Declaratory Judgment is denied. Plaintiff's Motion for Summary Judgment is denied. The February 24, 2005 Entry and Opinion represents the declaration of the rights and obligations of the respective parties. As explained therein, Plaintiff's Complaint for Declaratory Judgment while procedurally correct is substantively erroneous. Plaintiff's request for declaratory relief as set forth in its Complaint is denied. The Court declares that the application of H.B. 292 to the instant cases is preempted by the FELA and LBIA.

IT IS SO ORDERED.

/s/ HARRY A. HANNA
JUDGE HARRY A. HANNA

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Civil Action – Asbestos

Case No. CV-04-542998

NORFOLK SOUTHERN RAILWAY COMPANY,
Plaintiff,

v.

HOMER R. BOGLE, ET AL.,
Defendants.

[Filed April 15, 2005]

NUNC PRO TUNC ORDER

The Court wishes to clarify its February 24, 2005 Entry and Opinion (File & Serve I.D. #5210253). Defendant's Motion to Dismiss Norfolk Southern Railway Company's Complaint for Declaratory Judgment (File & Serve I.D. #4572906) is denied.

This entry is ordered Nunc Pro Tunc to correct the typographical error in this Court's unjournalized entry dated March 4, 2005.

IT IS SO ORDERED.

/s/ HARRY A. HANNA
JUDGE HARRY A. HANNA

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Case No. 542998

NORFOLK SOUTHERN RAILWAY COMPANY,
Plaintiff,

v.

HOMER R. BOGLE, ET AL.,
Defendants.

[Filed April 15, 2005]

ENTRY AND OPINION

I. INTRODUCTION

Plaintiff Norfolk Southern Railway Company ("Norfolk Southern") filed a Complaint for Declaratory Judgment[1] in four FELA/LBIA[2] cases: (1) Homer R. Bogle ("Bogle"), Case No. 518146; (2) William H. Monroe, Jr. ("Monroe"), Administrator of the Estate of Worth Oliver Bryant, Case No. 497980; (3) Charles Odell Weldon ("Weldon"), Case No. 391852; and (4) Eric C. Wiles ("Wiles"), Individually and in his capacity as Executor of the Estate of Larry Arnold Wiles, Case No. 391853. Norfolk Southern requests a Declaratory Judgment finding that: (1) Am. Sub. H.B. 292 applies to the four above-cited FELA/LBIA cases; (2) Am. Sub. H.B. 292 does not infringe upon

[1] File & Serve I.D. #4196730

[2] Federal Employers Liability Act, 45 U.S.C. § 51, et. seq., (FELA); Locomotive Boiler Inspection Act, 49 U.S.C. § 20701.

the Supremacy Clause of the Constitution of the United States.

In response, Defendants Bogle, Monroe, Weldon, and Wiles filed a Motion to Dismiss[3] Norfolk Southern's Complaint for Declaratory Judgment, asserting, inter alia, that the Complaint fails to raise a justiciable controversy because this Court has previously ordered that H.B. 292 does not apply to claims arising under the FELA and the LBIA.

Norfolk Southern then filed a Brief in Opposition[4] to Defendants' Motion to Dismiss, asserting a justiciable controversy exists as of January 3, 2005,[5] which marks the one hundred and twenty day (120) deadline in which to file a written report and supporting test results pursuant to R.C. § 2307.93. Additionally, Norfolk Southern contends that the Court's August 23, 2004 Order[6] is not binding on Bogle, Monroe, Weldon, and Wiles because that Order applied only to Special Docket 073958 cases and not to the instant actions.

II. LAW AND ARGUMENT

R.C. § 2721.03, the declaratory judgment statute, provides in part, "* * * any person whose rights, status, or other legal relations are affected by a * * * statute * * * may have determined any question of construction or validity arising under the * * *

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[3] File & Serve I.D. #4572906

[4] File & Serve I.D. #4694782

[5] In their brief, Plaintiff's assert the 120-day deadline expired on January 3, 2004; however, this is clearly a clerical error since Am. Sub. H.B. 292 took effect on September 2, 2004.

[6] File & Serve I.D. #4089851

statute and * * * obtain a declaration of rights, status, or other legal relations under it."

"In order to obtain declaratory relief, [a] plaintiff must establish (1) that a real controversy exists between the parties, (2) that the controversy is justiciable, and (3) that speedy relief is necessary to preserve the rights of the parties. * * * Inherent in these requirements is the principle that Ohio courts do not render advisory opinions." *R.A.S. Entertainment, Inc. v. Cleveland* (1998), 130 Ohio App.3d 125, citing *Burger Brewing Co. v. Ohio Liquor Control Co.nm.* (1973), 34 Ohio St.2d 93; *Haig v. Ohio State Bd. of Edn.* (1992), 62 Ohio St.3d 507; *Egan v. Natl. Distillers & Chem. Corp.* (1986), 25 Ohio St.3d 176.

It has been repeatedly held in Ohio that "There are only two reasons for dismissing a complaint for declaratory judgment before the court addresses the merits of the case: (1) there is neither a justiciable issue nor an actual controversy between the parties requiring speedy relief to preserve rights which may otherwise be lost or impaired; or (2) in accordance with R.C. 2721.07, the declaratory judgment will not terminate the uncertainty or controversy." *Halley v. Ohio Co.* (1995), 107 Ohio App.3d 518, citing *Wagner v. Cleveland* (1988), 62 Ohio App.3d 8; *Burger Brewing Co.* supra. A controversy exists when there is a genuine dispute between parties with opposing legal interests and that dispute is of sufficient immediacy that declaratory judgment is necessary. *Wagner*, 62 Ohio App.3d 8.

There is no doubt that an actual dispute exists between the parties herein. On January 3, 2005, the one hundred and twenty day (120) deadline in which to file a written report and supporting tests results pursuant to R.C. § 2307.93 expired. To date,

Defendants Bogle, Monroe, Weldon, and Wiles have not produced the required documentation. Therefore, Defendants are in violation of R.C. § 2307.93 *if* H.B. 292 applies to their FELA and LBIA claims.

We agree with Norfolk Southern that this Court's August 23, 2004 Order is not binding on Defendants' cases. In our Order we concluded: "The application of the Ohio statute *to the instant cases* is preempted by that extensive body of federal law" (emphasis added). The four cases now before the Court were not included in that Order, and are thus not binding on Defendants. However, we disagree with Norfolk Southern's assertion that H.B. 292 encompasses Defendants' civil actions in the Cuyahoga County Court of Common Pleas alleging asbestos claims under the FELA and/or the LBIA.

The general congressional intent to promote liberal recovery for injured railroad workers is well established. *See Ayers*, 538 U.S. 135, 123 S. Ct. 1210, 155 L. Ed. 2d 261; *Urie*, 337 U.S. at 163, 69 S. Ct. at 1018, 93 L. Ed. at 1282. There can be no dispute that the FELA was designed to regulate the entire field of railroad injuries and supersede and replace state regulation of those injuries. The FELA was **"undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce, and that it is paramount and exclusive."** *New York Central Railroad Company v. Winfield*, 244 U.S. 147, 152, 37 S. Ct. 546, 61 L. Ed. 1045 (1917) (emphasis added).

The congressional purpose of the Act was to provide a national law of uniform operation throughout the states and to **"withdraw all injuries to rail-**

road employees in interstate commerce from the operation of varying state laws." *Id.* at 150.

This purpose is exemplified in the legislative history of the statute:

> [The FELA] is intended in its scope to cover all commerce to which regulative power of Congress extends . . . by this bill it is hoped to fix a uniform rule of liability throughout the Union with reference to the liability of common carriers to their employees . . . **A Federal statute of this character will supplant the numerous state statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union and the legal status of such employer's liability for personal injuries, instead of being subject to numerous rules, will be fixed by one rule in all states.**

Id. at 150 (citations omitted) (emphasis added).

Accordingly, it has been an overriding principle of FELA jurisprudence, established by Congress, emphasized repeatedly by the Supreme Court of the United States and well-recognized here in Ohio, that a **"substantive right or defense arising under the act cannot be lessened or destroyed by a local rule . . ."** *Norfolk Southern Railroad v. Ferebee*, 238 U.S. 269, 35 S. Ct. 781, 59 L. Ed. 1303 (1915) (emphasis added); *see also South Buffalo Rail Company v. Ahern*, 344 U.S. 367, 73 S. Ct. 340, 97 L. Ed. 395 (1952) **("Peculiarities of local law may not gnaw at rights rooted in federal legislation.")** (emphasis added). *See* August 23, 2004 Order at p. 4-5.

III. CONCLUSION

Norfolk Southern's Complaint for Declaratory Judgment, while procedurally correct, is substantively erroneous. The application of H.B. 292 to the instant cases is preempted by the FELA and LBIA. Furthermore, all pending and future FELA/LBIA cases filed by plaintiffs pursuant to R.C. § 2307.93, et seq., are preempted by that extensive body of federal jurisprudence.

IT IS SO ORDERED.

Judge Leo M. Spellacy
Judge Harry A. Hanna
Justice Francis E. Sweeney

February 24, 2005

/s/ HARRY A. HANNA
JUDGE HARRY A. HANNA

SUPREME COURT OF OHIO

No. 2006-1025

NORFOLK SOUTHERN RAILWAY COMPANY,
Appellant,

v.

HOMER R. BOGLE, ET AL.,
Appellees.

[December 12, 2007]

RECONSIDERATION ENTRY

It is ordered by the Court that the motion for reconsideration in this case is denied.

(Cuyahoga County Court of Appeals; No. 86339)

/s/ THOMAS J. MOYER
THOMAS J. MOYER
Chief Justice

STATUTORY PROVISIONS INVOLVED

45 U.S.C. § 51 provides:

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C. § 56 provides:

§ 56. Actions; limitation; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

49 U.S.C. § 20701 provides:

§ 20701. Requirements for use

A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances –

(1) are in proper condition and safe to operate without unnecessary danger of personal injury;

(2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and

(3) can withstand every test prescribed by the Secretary under this chapter.

Ohio Rev. Code Ann. §§ 2307.91-2307.96 provide:

§ 2307.91 Definitions

As used in sections 2307.91 to 2307.96 of the Revised Code:

(A) "AMA guides to the evaluation of permanent impairment" means the American medical association's guides to the evaluation of permanent impairment (fifth edition 2000) as may be modified by the American medical association.

(B) "Asbestos" means chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos, actinolite asbestos, and any of these minerals that have been chemically treated or altered.

(C) "Asbestos claim" means any claim for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos. "Asbestos claim" includes a claim made by or on behalf of any person who has been exposed to asbestos, or any representative, spouse, parent, child, or other relative of that person, for injury, including mental or emotional injury, death, or loss to person, risk of disease or other injury, costs of medical monitoring or surveillance, or any other effects on the person's health that are caused by the person's exposure to asbestos.

(D) "Asbestosis" means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos fibers.

(E) "Board-certified internist" means a medical doctor who is currently certified by the American board of internal medicine.

(F) "Board-certified occupational medicine specialist" means a medical doctor who is currently certified by the American board of preventive medicine in the specialty of occupational medicine.

(G) "Board-certified oncologist" means a medical doctor who is currently certified by the American board of internal medicine in the subspecialty of medical oncology.

(H) "Board-certified pathologist" means a medical doctor who is currently certified by the American board of pathology.

(I) "Board-certified pulmonary specialist" means a medical doctor who is currently certified by the American board of internal medicine in the subspecialty of pulmonary medicine.

(J) "Certified B-reader" means an individual qualified as a "final" or "B-reader" as defined in 42 C.F.R. section 37.51(b), as amended.

(K) "Certified industrial hygienist" means an industrial hygienist who has attained the status of diplomate of the American academy of industrial hygiene subject to compliance with requirements established by the American board of industrial hygiene.

(L) "Certified safety professional" means a safety professional who has met and continues to meet all requirements established by the board of certified safety professionals and is authorized by that board to use the certified safety professional title or the CSP designation.

(M) "Civil action" means all suits or claims of a civil nature in a state or federal court, whether cognizable

as cases at law or in equity or admiralty. "Civil action" does not include any of the following:

(1) A civil action relating to any workers' compensation law;

(2) A civil action alleging any claim or demand made against a trust established pursuant to 11 U.S.C. section 524(g);

(3) A civil action alleging any claim or demand made against a trust established pursuant to a plan of reorganization confirmed under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. Chapter 11.

(N) "Exposed person" means any person whose exposure to asbestos or to asbestos-containing products is the basis for an asbestos claim under section 2307.92 of the Revised Code.

(O) "FEV1" means forced expiratory volume in the first second, which is the maximal volume of air expelled in one second during performance of simple spirometric tests.

(P) "FVC" means forced vital capacity that is maximal volume of air expired with maximum effort from a position of full inspiration.

(Q) "ILO scale" means the system for the classification of chest x-rays set forth in the international labour office's guidelines for the use of ILO international classification of radiographs of pneumoconioses (2000), as amended.

(R) "Lung cancer" means a malignant tumor in which the primary site of origin of the cancer is inside the lungs, but that term does not include mesothelioma.

(S) "Mesothelioma" means a malignant tumor with a primary site of origin in the pleura or the peritoneum, which has been diagnosed by a board-certified pathologist, using standardized and accepted criteria of microscopic morphology and appropriate staining techniques.

(T) "Nonmalignant condition" means a condition that is caused or may be caused by asbestos other than a diagnosed cancer.

(U) "Pathological evidence of asbestosis" means a statement by a board-certified pathologist that more than one representative section of lung tissue uninvolved with any other disease process demonstrates a pattern of peribronchiolar or parenchymal scarring in the presence of characteristic asbestos bodies and that there is no other more likely explanation for the presence of the fibrosis.

(V) "Physical impairment" means a nonmalignant condition that meets the minimum requirements specified in division (B) of section 2307.92 of the Revised Code, lung cancer of an exposed person who is a smoker that meets the minimum requirements specified in division (C) of section 2307.92 of the Revised Code, or a condition of a deceased exposed person that meets the minimum requirements specified in division (D) of section 2307.92 of the Revised Code.

(W) "Plethysmography" means a test for determining lung volume, also known as "body plethysmography," in which the subject of the test is enclosed in a chamber that is equipped to measure pressure, flow, or volume changes.

(X) "Predicted lower limit of normal" means the fifth percentile of healthy populations based on age, height, and gender, as referenced in the AMA guides to the evaluation of permanent impairment.

(Y) "Premises owner" means a person who owns, in whole or in part, leases, rents, maintains, or controls privately owned lands, ways, or waters, or any buildings and structures on those lands, ways, or waters, and all privately owned and state-owned lands, ways, or waters leased to a private person, firm, or organization, including any buildings and structures on those lands, ways, or waters.

(Z) "Competent medical authority" means a medical doctor who is providing a diagnosis for purposes of constituting prima-facie evidence of an exposed person's physical impairment that meets the requirements specified in section 2307.92 of the Revised Code and who meets the following requirements:

(1) The medical doctor is a board-certified internist, pulmonary specialist, oncologist, pathologist, or occupational medicine specialist.

(2) The medical doctor is actually treating or has treated the exposed person and has or had a doctor-patient relationship with the person.

(3) As the basis for the diagnosis, the medical doctor has not relied, in whole or in part, on any of the following:

(a) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition in violation of any law, regulation, licensing requirement, or medical code of

practice of the state in which that examination, test, or screening was conducted;

(b) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that was conducted without clearly establishing a doctor-patient relationship with the claimant or medical personnel involved in the examination, test, or screening process;

(c) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that required the claimant to agree to retain the legal services of the law firm sponsoring the examination, test, or screening.

(4) The medical doctor spends not more than twenty-five per cent of the medical doctor's professional practice time in providing consulting or expert services in connection with actual or potential tort actions, and the medical doctor's medical group, professional corporation, clinic, or other affiliated group earns not more than twenty per cent of its revenues from providing those services.

(AA) "Radiological evidence of asbestosis" means a chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader as at least 1/1 on the ILO scale.

(BB) "Radiological evidence of diffuse pleural thickening" means a chest x-ray showing bilateral pleural thickening graded by a certified B-reader as at least B2 on the ILO scale and blunting of at least one costophrenic angle.

(CC) "Regular basis" means on a frequent or recurring basis.

(DD) "Smoker" means a person who has smoked the equivalent of one-pack year, as specified in the written report of a competent medical authority pursuant to sections 2307.92 and 2307.93 of the Revised Code, during the last fifteen years.

(EE) "Spirometry" means the measurement of volume of air inhaled or exhaled by the lung.

(FF) "Substantial contributing factor" means both of the following:

(1) Exposure to asbestos is the predominate cause of the physical impairment alleged in the asbestos claim.

(2) A competent medical authority has determined with a reasonable degree of medical certainty that without the asbestos exposures the physical impairment of the exposed person would not have occurred.

(GG) "Substantial occupational exposure to asbestos" means employment for a cumulative period of at least five years in an industry and an occupation in which, for a substantial portion of a normal work year for that occupation, the exposed person did any of the following:

(1) Handled raw asbestos fibers;

(2) Fabricated asbestos-containing products so that the person was exposed to raw asbestos fibers in the fabrication process;

(3) Altered, repaired, or otherwise worked with an asbestos-containing product in a manner that

exposed the person on a regular basis to asbestos fibers;

(4) Worked in close proximity to other workers engaged in any of the activities described in division (GG)(1), (2), or (3) of this section in a manner that exposed the person on a regular basis to asbestos fibers.

(HH) "Timed gas dilution" means a method for measuring total lung capacity in which the subject breathes into a spirometer containing a known concentration of an inert and insoluble gas for a specific time, and the concentration of the inert and insoluble gas in the lung is then compared to the concentration of that type of gas in the spirometer.

(II) "Tort action" means a civil action for damages for injury, death, or loss to person. "Tort action" includes a product liability claim that is subject to sections 2307.71 to 2307.80 of the Revised Code. "Tort action" does not include a civil action for damages for a breach of contract or another agreement between persons.

(JJ) "Total lung capacity" means the volume of air contained in the lungs at the end of a maximal inspiration.

(KK) "Veterans' benefit program" means any program for benefits in connection with military service administered by the veterans' administration under title 38 of the United States Code.

(LL) "Workers' compensation law" means Chapters 4121., 4123., 4127., and 4131. of the Revised Code.

§ 2307.92 Requirements for prima-facie showing of physical impairment for certain tort actions involving asbestos exposure

(A) For purposes of section 2305.10 and sections 2307.92 to 2307.95 of the Revised Code, "bodily injury caused by exposure to asbestos" means physical impairment of the exposed person, to which the person's exposure to asbestos is a substantial contributing factor.

(B) No person shall bring or maintain a tort action alleging an asbestos claim based on a nonmalignant condition in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.93 of the Revised Code, that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(1) Evidence verifying that a competent medical authority has taken a detailed occupational and exposure history of the exposed person from the exposed person or, if that person is deceased, from the person who is most knowledgeable about the exposures that form the basis of the asbestos claim for a nonmalignant condition, including all of the following:

(a) All of the exposed person's principal places of employment and exposures to airborne contaminants;

(b) Whether each principal place of employment involved exposures to airborne contaminants, including, but not limited to, asbestos fibers or other disease causing dusts, that can cause pulmonary impairment and, if that type of exposure is involved, the general nature, duration, and general level of the exposure.

(2) Evidence verifying that a competent medical authority has taken a detailed medical and smoking history of the exposed person, including a thorough review of the exposed person's past and present medical problems and the most probable causes of those medical problems;

(3) A diagnosis by a competent medical authority, based on a medical examination and pulmonary function testing of the exposed person, that all of the following apply to the exposed person:

(a) The exposed person has a permanent respiratory impairment rating of at least class 2 as defined by and evaluated pursuant to the AMA guides to the evaluation of permanent impairment.

(b) Either of the following:

(i) The exposed person has asbestosis or diffuse pleural thickening, based at a minimum on radiological or pathological evidence of asbestosis or radiological evidence of diffuse pleural thickening. The asbestosis or diffuse pleural thickening described in this division, rather than solely chronic obstructive pulmonary disease, is a substantial contributing factor to the exposed person's physical impairment, based

at a minimum on a determination that the exposed person has any of the following:

(I) A forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal;

(II) A total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal;

(III) A chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader at least 2/1 on the ILO scale.

(ii) If the exposed person has a chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader as only a 1/0 on the ILO scale, then in order to establish that the exposed person has asbestosis, rather than solely chronic obstructive pulmonary disease, that is a substantial contributing factor to the exposed person's physical impairment the plaintiff must establish that the exposed person has both of the following:

(I) A forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal;

(II) A total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal.

(C)(1) No person shall bring or maintain a tort action alleging an asbestos claim based upon lung cancer of an exposed person who is a smoker, in the absence of a prima-facie showing, in the manner

described in division (A) of section 2307.93 of the Revised Code, that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(a) A diagnosis by a competent medical authority that the exposed person has primary lung cancer and that exposure to asbestos is a substantial contributing factor to that cancer;

(b) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the exposed person's first exposure to asbestos until the date of diagnosis of the exposed person's primary lung cancer. The ten-year latency period described in this division is a rebuttable presumption, and the plaintiff has the burden of proof to rebut the presumption.

(c) Either of the following:

(i) Evidence of the exposed person's substantial occupational exposure to asbestos;

(ii) Evidence of the exposed person's exposure to asbestos at least equal to 25 fiber per cc years as determined to a reasonable degree of scientific probability by a scientifically valid retrospective exposure reconstruction conducted by a certified industrial hygienist or certified safety professional based upon all reasonably available quantitative air monitoring data and all other reasonably available information about the exposed

person's occupational history and history of exposure to asbestos.

(2) If a plaintiff files a tort action that alleges an asbestos claim based upon lung cancer of an exposed person who is a smoker, alleges that the plaintiff's exposure to asbestos was the result of living with another person who, if the tort action had been filed by the other person, would have met the requirements specified in division (C)(1)(c) of this section, and alleges that the plaintiff lived with the other person for the period of time specified in division (GG) of section 2307.91 of the Revised Code, the plaintiff is considered as having satisfied the requirements specified in division (C)(1)(c) of this section.

(D)(1) No person shall bring or maintain a tort action alleging an asbestos claim that is based upon a wrongful death, as described in section 2125.01 of the Revised Code of an exposed person in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.93 of the Revised Code, that the death of the exposed person was the result of a physical impairment, that the death and physical impairment were a result of a medical condition, and that the deceased person's exposure to asbestos was a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(a) A diagnosis by a competent medical authority that exposure to asbestos was a substantial contributing factor to the death of the exposed person;

(b) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the deceased exposed person's first exposure to

asbestos until the date of diagnosis or death of the deceased exposed person. The ten-year latency period described in this division is a rebuttable presumption, and the plaintiff has the burden of proof to rebut the presumption.

(c) Either of the following:

(i) Evidence of the deceased exposed person's substantial occupational exposure to asbestos;

(ii) Evidence of the deceased exposed person's exposure to asbestos at least equal to 25 fiber per cc years as determined to a reasonable degree of scientific probability by a scientifically valid retrospective exposure reconstruction conducted by a certified industrial hygienist or certified safety professional based upon all reasonably available quantitative air monitoring data and all other reasonably available information about the deceased exposed person's occupational history and history of exposure to asbestos.

(2) If a person files a tort action that alleges an asbestos claim based on a wrongful death, as described in section 2125.01 of the Revised Code, of an exposed person, alleges that the death of the exposed person was the result of living with another person who, if the tort action had been filed by the other person, would have met the requirements specified in division (D)(1)(c) of this section, and alleges that the exposed person lived with the other person for the period of time specified in division (GG) of section 2307.91 of the Revised Code in order to qualify as a substantial occupational exposure to asbestos, the exposed person is considered as having satisfied the requirements specified in division (D)(1)(c) of this section.

(3) No court shall require or permit the exhumation of a decedent for the purpose of obtaining evidence to make, or to oppose, a prima-facie showing required under division (D)(1) or (2) of this section regarding a tort action of the type described in that division.

(E) No prima-facie showing is required in a tort action alleging an asbestos claim based upon mesothelioma.

(F) Evidence relating to physical impairment under this section, including pulmonary function testing and diffusing studies, shall comply with the technical recommendations for examinations, testing procedures, quality assurance, quality control, and equipment incorporated in the AMA guides to the evaluation of permanent impairment and reported as set forth in 20 C.F.R. Pt. 404, Subpt. P, App. 1, Part A, Sec. 3.00 E. and F., and the interpretive standards set forth in the official statement of the American thoracic society entitled "lung function testing: selection of reference values and interpretive strategies" as published in American review of respiratory disease, 1991:144:1202-1218.

(G) All of the following apply to the court's decision on the prima-facie showing that meets the requirements of division (B), (C), or (D) of this section:

(1) The court's decision does not result in any presumption at trial that the exposed person has a physical impairment that is caused by an asbestos-related condition.

(2) The court's decision is not conclusive as to the liability of any defendant in the case.

(3) The court's findings and decisions are not admissible at trial.

(4) If the trier of fact is a jury, the court shall not instruct the jury with respect to the court's decision on the prima-facie showing, and neither counsel for any party nor a witness shall inform the jury or potential jurors of that showing.

2307.93 Filing of report and test results supporting physical impairment claim; defendant's challenge of evidence; dismissal

(A)(1) The plaintiff in any tort action who alleges an asbestos claim shall file, within thirty days after filing the complaint or other initial pleading, a written report and supporting test results constituting prima-facie evidence of the exposed person's physical impairment that meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code, whichever is applicable. The defendant in the case shall be afforded a reasonable opportunity, upon the defendant's motion, to challenge the adequacy of the proffered prima-facie evidence of the physical impairment for failure to comply with the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code. The defendant has one hundred twenty days from the date the specified type of prima-facie evidence is proffered to challenge the adequacy of that prima-facie evidence. If the defendant makes that challenge and uses a physician to do so, the physician must meet the requirements

specified in divisions (Z)(1), (3), and (4) of section 2307.91 of the Revised Code.

(2) With respect to any asbestos claim that is pending on the effective date of this section, the plaintiff shall file the written report and supporting test results described in division (A)(1) of this section within one hundred twenty days following the effective date of this section. Upon motion and for good cause shown, the court may extend the one hundred twenty-day period described in this division.

(3)(a) For any cause of action that arises before the effective date of this section, the provisions set forth in divisions (B), (C), and (D) of section 2307.92 of the Revised Code are to be applied unless the court that has jurisdiction over the case finds both of the following:

(i) A substantive right of a party to the case has been impaired.

(ii) That impairment is otherwise in violation of Section 28 of Article II, Ohio Constitution.

(b) If a finding under division (A)(3)(a) of this section is made by the court that has jurisdiction over the case, then the court shall determine whether the plaintiff has failed to provide sufficient evidence to support the plaintiff's cause of action or the right to relief under the law that is in effect prior to the effective date of this section.

(c) If the court that has jurisdiction of the case finds that the plaintiff has failed to provide sufficient evidence to support the plaintiff's cause of action or right to relief under division (A)(3)(b) of this section, the court shall administratively dismiss the plaintiff's claim without prejudice. The court shall main-

tain its jurisdiction over any case that is administratively dismissed under this division. Any plaintiff whose case has been administratively dismissed under this division may move to reinstate the plaintiff's case if the plaintiff provides sufficient evidence to support the plaintiff's cause of action or the right to relief under the law that was in effect when the plaintiff's cause of action arose.

(B) If the defendant in an action challenges the adequacy of the prima-facie evidence of the exposed person's physical impairment as provided in division (A)(1) of this section, the court shall determine from all of the evidence submitted whether the proffered prima-facie evidence meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code. The court shall resolve the issue of whether the plaintiff has made the prima-facie showing required by division (B), (C), or (D) of section 2307.92 of the Revised Code by applying the standard for resolving a motion for summary judgment.

(C) The court shall administratively dismiss the plaintiff's claim without prejudice upon a finding of failure to make the prima-facie showing required by division (B), (C), or (D) of section 2307.92 of the Revised Code. The court shall maintain its jurisdiction over any case that is administratively dismissed under this division. Any plaintiff whose case has been administratively dismissed under this division may move to reinstate the plaintiff's case if the plaintiff makes a prima-facie showing that meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code.

2307.94 Statute of limitations for asbestos claim arising out of nonmalignant condition as distinct cause of action; damages; settlement; release

(A) Notwithstanding any other provision of the Revised Code, with respect to any asbestos claim based upon a nonmalignant condition that is not barred as of the effective date of this section, the period of limitations shall not begin to run until the exposed person has a cause of action for bodily injury pursuant to section 2305.10 of the Revised Code. An asbestos claim based upon a nonmalignant condition that is filed before the cause of action for bodily injury pursuant to that section arises is preserved for purposes of the period of limitations.

(B) An asbestos claim that arises out of a nonmalignant condition shall be a distinct cause of action from an asbestos claim relating to the same exposed person that arises out of asbestos-related cancer. No damages shall be awarded for fear or risk of cancer in any tort action asserting only an asbestos claim for a nonmalignant condition.

(C) No settlement of an asbestos claim for a nonmalignant condition that is concluded after the effective date of this section shall require, as a condition of settlement, the release of any future claim for asbestos-related cancer.

2307.941 Premises liability

(A) The following apply to all tort actions for asbestos claims brought against a premises owner to recover damages or other relief for exposure to asbestos on the premises owner's property:

(1) A premises owner is not liable for any injury to any individual resulting from asbestos exposure unless that individual's alleged exposure occurred while the individual was at the premises owner's property.

(2) If exposure to asbestos is alleged to have occurred before January 1, 1972, it is presumed that a premises owner knew that this state had adopted safe levels of exposure for asbestos and that products containing asbestos were used on its property only at levels below those safe levels of exposure. To rebut this presumption, the plaintiff must prove by a preponderance of the evidence that the premises owner knew or should have known that the levels of asbestos in the immediate breathing zone of the plaintiff regularly exceeded the threshold limit values adopted by this state and that the premises owner allowed that condition to persist.

(3)(a) A premises owner is presumed to be not liable for any injury to any invitee who was engaged to work with, install, or remove asbestos products on the premises owner's property if the invitee's employer held itself out as qualified to perform the work. To rebut this presumption, the plaintiff must prove by a preponderance of the evidence that at the time of the exposure to asbestos that is alleged the premises owner had actual knowledge of the potential dangers of the asbestos

products at the time of the alleged exposure that was superior to the knowledge of both the invitee and the invitee's employer.

(b) A premises owner that hired a contractor before January 1, 1972, to perform the type of work at the premises owner's property that the contractor was qualified to perform cannot be liable for any injury to any individual resulting from asbestos exposure caused by any of the contractor's employees or agents on the premises owner's property unless the premises owner directed the activity that resulted in the injury or gave or denied permission for the critical acts that led to the individual's injury.

(c) If exposure to asbestos is alleged to have occurred on or after January 1, 1972, a premises owner is not liable for any injury to any individual resulting from that exposure caused by a contractor's employee or agent on the premises owner's property unless the plaintiff establishes the premises owner's intentional violation of an established safety standard that was in effect at the time of the exposure and that the alleged violation was in the plaintiff's breathing zone and was the proximate cause of the plaintiff's medical condition.

(B) As used in this section:

(1) "Threshold limit values" means that, for the years 1946 through 1971, the concentration of asbestos in a worker's breathing zone did not exceed the following maximum allowable exposure limits for the eight-hour time-weighted average airborne concentration:

(a) Asbestos: five million particles per cubic foot;

(b) Cadmium: 0.10 milligrams per cubic meter;

(c) Chromic acid and chromates (calculated as chromic oxide): 0.10 milligrams per cubic meter;

(d) Lead: 0.15 milligrams per cubic meter;

(e) Manganese: 6.0 milligrams per cubic meter;

(f) Mercury: 0.10 milligrams per cubic meter;

(g) Zinc oxide: 15.0 milligrams per cubic meter;

(h) Chlorinated diphenyls: 1.0 milligram per cubic meter;

(i) Chlorinated naphthalenes (trichlornaphthalene): 5.0 milligrams per cubic meter;

(j) Chlorinated naphthalenes (pentachlornaphthalene): 0.50 milligrams per cubic meter.

(2) "Established safety standard" means that, for the years after 1971, the concentration of asbestos in the breathing zone of a worker does not exceed the maximum allowable exposure limits for the eight-hour time-weighted average airborne concentration as promulgated by the occupational safety and health administration (OSHA) in effect at the time of the alleged exposure.

(3) "Employee" means an individual who performs labor or provides construction services pursuant to a construction contract as defined in section 4123.79 of the Revised Code, or a remodeling or repair contract, whether written or oral, if at least ten of the following criteria apply:

(a) The individual is required to comply with instructions from the other contracting party

regarding the manner or method of performing services.

(b) The individual is required by the other contracting party to have particular training.

(c) The individual's services are integrated into the regular functioning of the other contracting party.

(d) The individual is required to perform the work personally.

(e) The individual is hired, supervised, or paid by the other contracting party.

(f) A continuing relationship exists between the individual and the other contracting party that contemplates continuing or recurring work even if the work is not full time.

(g) The individual's hours of work are established by the other contracting party.

(h) The individual is required to devote full time to the business of the other contracting party.

(i) The person is required to perform the work on the premises of the other contracting party.

(j) The individual is required to follow the order of work set by the other contracting party.

(k) The individual is required to make oral or written reports of progress to the other contracting party.

(l) The individual is paid for services on a regular basis, including hourly, weekly, or monthly.

(m) The individual's expenses are paid for by the other contracting party.

(n) The individual's tools and materials are furnished by the other contracting party.

(o) The individual is provided with the facilities used to perform services.

(p) The individual does not realize a profit or suffer a loss as a result of the services provided.

(q) The individual is not performing services for a number of employers at the same time.

(r) The individual does not make the same services available to the general public.

(s) The other contracting party has a right to discharge the individual.

(t) The individual has the right to end the relationship with the other contracting party without incurring liability pursuant to an employment contract or agreement.

2307.95 Applicability

(A) Nothing in sections 2307.92 to 2307.95 of the Revised Code is intended to do, and nothing in any of those sections shall be interpreted to do, either of the following:

(1) Affect the rights of any party in bankruptcy proceedings;

(2) Affect the ability of any person who is able to make a showing that the person satisfies the claim criteria for compensable claims or demands under a trust established pursuant to a plan of reorganization under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. Chapter 11, to make a claim or demand against that trust.

(B) Sections 2307.91 to 2307.95 of the Revised Code shall not affect the scope or operation of any workers' compensation law or veterans' benefit program or the exclusive remedy of subrogation under the provisions of that law or program and shall not authorize any lawsuit that is barred by any provision of any workers' compensation law.

(C) Except as provided in division (D) of section 2307.92 of the Revised Code and in other provisions that relate to the application of that division and the procedures and criteria it contains, nothing in sections 2307.92, 2307.93, 2307.94, and 2307.95 of the Revised Code is intended, and nothing in any of those sections shall be interpreted, to affect any wrongful death claim, as described in section 2125.01 of the Revised Code.

2307.96 Plaintiff's burden of proof in tort actions; factors considered

(A) If a plaintiff in a tort action alleges any injury or loss to person resulting from exposure to asbestos as a result of the tortious act of one or more defendants, in order to maintain a cause of action against any of those defendants based on that injury or loss, the plaintiff must prove that the conduct of that particular defendant was a substantial factor in causing the injury or loss on which the cause of action is based.

(B) A plaintiff in a tort action who alleges any injury or loss to person resulting from exposure to asbestos has the burden of proving that the plaintiff was exposed to asbestos that was manufactured, supplied, installed, or used by the defendant in the action and that the plaintiff's exposure to the defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss. In determining whether exposure to a particular defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss, the trier of fact in the action shall consider, without limitation, all of the following:

(1) The manner in which the plaintiff was exposed to the defendant's asbestos;

(2) The proximity of the defendant's asbestos to the plaintiff when the exposure to the defendant's asbestos occurred;

(3) The frequency and length of the plaintiff's exposure to the defendant's asbestos;

(4) Any factors that mitigated or enhanced the plaintiff's exposure to asbestos.

(C) This section applies only to tort actions that allege any injury or loss to person resulting from exposure to asbestos and that are brought on or after the effective date of this section.

Section 3 of 2004 Ohio Laws File 88 (Am. Sub. H.B. 292) provides:

SECTION 3. (A) The General Assembly makes the following statement of findings and intent:

(1) Asbestos claims have created an increased amount of litigation in state and federal courts that the United States Supreme Court has characterized as "an elephant mass" of cases.

(2) The current asbestos personal injury litigation system is unfair and inefficient, imposing a severe burden on litigants and taxpayers alike. A recent RAND study estimates that a total of fifty-four billion dollars have already been spent on asbestos litigation and the costs continue to mount. Compensation for asbestos claims has risen sharply since 1993. The typical claimant in an asbestos lawsuit now names sixty to seventy defendants, compared with an average of twenty named defendants two decades ago. The RAND Report also suggests that at best, only one-half of all claimants have come forward and at worst, only one-fifth have filed claims to date. Estimates of the total cost of all claims range from two hundred to two hundred sixty-five billion dollars. Tragically, plaintiffs are receiving less than forty-three cents on every dollar awarded, and sixty-five per cent of the compensation paid, thus far, has gone to claimants who are not sick.

(3) The extraordinary volume of nonmalignant asbestos cases continue to strain federal and state courts.

(a) Today, it is estimated that there are more than two hundred thousand active asbestos cases in courts nationwide. According to a recent RAND

study, over six hundred thousand people have filed asbestos claims for asbestos-related personal injuries through the end of 2000.

(b) Before 1998, five states, Mississippi, New York, West Virginia, Texas, and Ohio, accounted for nine per cent of the cases filed. However, between 1998 and 2000, these same five states handled sixty-six per cent of all filings. Today, Ohio has become a haven for asbestos claims and, as a result, is one of the top five state court venues for asbestos filings.

(c) According to testimony by Laura Hong, a partner at the law firm of Squire, Sanders & Dempsey who has been defending companies in asbestos personal injury litigation since 1985, there are at least thirty-five thousand asbestos personal injury cases pending in Ohio state courts today.

(d) If the two hundred thirty-three Ohio state court general jurisdictional judges started trying these asbestos cases today, Ms. Hong noted, each would have to try over one hundred fifty cases before retiring the current docket. That figure conservatively computes to at least one hundred fifty trial weeks or more than three years per judge to retire the current docket.

(e) The current docket, however, continues to increase at an exponential rate. According to Judge Leo Spellacy, one of two Cuyahoga County Common Pleas Court judges appointed by the Ohio Supreme Court to manage the Cuyahoga County case management order for asbestos cases, in 1999 there were approximately twelve thousand eight hundred pending asbestos cases in Cuyahoga County. However, by the end of October 2003,

there were over thirty-nine thousand pending asbestos cases. Approximately two hundred new asbestos cases are filed in Cuyahoga County every month.

(4) Nationally, asbestos personal injury litigation has already contributed to the bankruptcy of more than seventy companies, including nearly all manufacturers of asbestos textile and insulation products, and the ratio of asbestos-driven bankruptcies is accelerating.

(a) As stated by Linda Woggon, Vice President of Governmental Affairs of the Ohio Chamber of Commerce, a recent RAND study found that during the first ten months of 2002, fifteen companies facing significant asbestos-related liabilities filed for bankruptcy and more than sixty thousand jobs have been lost because of these bankruptcies. The RAND study estimates that the eventual cost of asbestos litigation could reach as high as four hundred twenty-three thousand jobs.

(b) Joseph Stiglitz, Nobel award-winning economist, in "The Impact of Asbestos Liabilities on Workers in Bankrupt Firms," calculated that bankruptcies caused by asbestos have already resulted in the loss of up to sixty thousand jobs and that each displaced worker in the bankrupt companies will lose, on average, an estimated twenty-five thousand to fifty thousand dollars in wages over the worker's career, and at least a quarter of the accumulated pension benefits.

(c) At least five Ohio-based companies have been forced into bankruptcy because of an unending flood of asbestos cases brought by claimants who are not sick.

(d) Owens Corning, a Toledo company, has been sued four hundred thousand times by plaintiffs alleging asbestos-related injury and as a result was forced to file bankruptcy. The type of job and pension loss many Toledoans have faced because of the Owens Corning bankruptcy also can be seen in nearby Licking County where, in 2000, Owens Corning laid off two hundred seventy-five workers from its Granville plant. According to a study conducted by NERA Economic Consulting in 2000, the ripple effect of those losses is predicted to result in a total loss of five hundred jobs and a fifteen-million to twenty-million dollar annual reduction in regional income.

(e) According to testimony presented by Robert Bunda, a partner at the firm of Bunda, Stutz & DeWitt in Toledo, Ohio who has been involved with the defense of asbestos cases on behalf of Owens-Illinois for twenty-four years, at least five Ohio-based companies have gone bankrupt because of the cost of paying people who are not sick. Wage losses, pension losses, and job losses have significantly affected workers for the bankrupt companies like Owens Corning, Babcox & Wilcox, North American Refractories, and A-Best Corp.

(5) The General Assembly recognizes that the vast majority of Ohio asbestos claims are filed by individuals who allege they have been exposed to asbestos and who have some physical sign of exposure to asbestos, but who do not suffer from an asbestos-related impairment. Eighty-nine per cent of asbestos claims come from people who do not have cancer. Sixty-six to ninety per cent of these non-cancer claimants are not sick. According to a Tillinghast-Towers Perrin study, ninety-four per cent of the fifty-

two thousand nine hundred asbestos claims filed in 2000 concerned claimants who are not sick. As a result, the General Assembly recognizes that reasonable medical criteria are a necessary response to the asbestos litigation crisis in this state. Medical criteria will expedite the resolution of claims brought by those sick claimants and will ensure that resources are available for those who are currently suffering from asbestos-related illnesses and for those who may become sick in the future. As stated by Dr. James Allen, a pulmonologist, Professor and Vice-Chairman of the Department of Internal Medicine at The Ohio State University, the medical criteria included in this act are reasonable criteria and are the first step toward ensuring that impaired plaintiffs are compensated. In fact, Dr. Allen noted that these criteria are minimum medical criteria. In his clinical practice, Dr. Allen stated that he always performs additional tests before assigning a diagnosis of asbestosis and would never rely solely on these medical criteria.

(6) The cost of compensating exposed individuals who are not sick jeopardizes the ability of defendants to compensate people with cancer and other serious asbestos-related diseases, now and in the future; threatens savings, retirement benefits, and jobs of the state's current and retired employees; adversely affects the communities in which these defendants operate; and impairs Ohio's economy.

(7) The public interest requires the deferring of claims of exposed individuals who are not sick in order to preserve, now and for the future, defendants' ability to compensate people who develop cancer and other serious asbestos-related injuries and to safe-

guard the jobs, benefits, and savings of the state's employees and the well being of the Ohio economy.

(B) In enacting sections 2307.91 to 2307.98 of the Revised Code, it is the intent of the General Assembly to: (1) give priority to those asbestos claimants who can demonstrate actual physical harm or illness caused by exposure to asbestos; (2) fully preserve the rights of claimants who were exposed to asbestos to pursue compensation should those claimants become impaired in the future as a result of such exposure; (3) enhance the ability of the state's judicial systems and federal judicial systems to supervise and control litigation and asbestos-related bankruptcy proceedings; and (4) conserve the scarce resources of the defendants to allow compensation of cancer victims and others who are physically impaired by exposure to asbestos while securing the right to similar compensation for those who may suffer physical impairment in the future.